

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-5017

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of
PRECISION POLYMERS, INC.,
PRECISION THERMOPLASTICS CORP.,
FLO-TITE PLASTICS CORP.,
Debtors.

ROBINTech, INCORPORATED,
SHINTECH INCORPORATED and
PLASTILINE, INC.,

Appellants,

- against -

PRECISION POLYMERS, INC., and
PRECISION THERMOPLASTICS CORP.,

Appellees.

On Appeal from the United States
District Court for the Southern
District of New York

REPLY BRIEF OF APPELLANTS



KRAUSE, HIRSCH & GROSS
41 EAST 42ND STREET
NEW YORK, N. Y. 10017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

In the Matter of

Docket No. 77-5017

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PRECISION THERMOPLASTICS CORP.,
FLO-TITE PLASTICS CORP.,

Debtors.

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SHINTECH INCORPORATED and
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- against -

PRECISION POLYMERS, INC., and
PRECISION THERMOPLASTICS CORP.,

Appellees.

-----X

REPLY BRIEF OF APPELLANTS ROBINTech,
INCORPORATED ("ROBINTech"), SHINTECH
INCORPORATED ("SHINTECH") and
PLASTILINE, INC. ("PLASTILINE") IN
REPLY TO BRIEF OF APPELLEES PRECISION
POLYMERS, INC. ("PRECISION") and
PRECISION THERMOPLASTICS CORP.
("THERMOPLASTICS")

Preliminary Statement

This reply brief is addressed to the brief of
Appellees. There is a related appeal Docket No. 77-7339
which is to be argued at the same time as the instant appeal.
Each of the above appeals has been separately briefed and the
within reply brief relates only to the issues raised in

connection with the above captioned appeal. The principal question overriding both of the aforesaid appeals is whether or not the parties to the appeals have entered into a compromise of the various disputes between them. ("the Compromise").

Issues Presented for Review

Appellants rely on their statement of issues presented for review as set forth in their brief. Appellees' Counter-Statement of Issues asserts that Appellants have raised an issue (#3 of Appellees' Issues Presented on Review, page 1 of Appellees' brief) which was not raised by Appellants. (see Point I below).

STATEMENT OF FACTS

Appellants stand on their Statement of the Case and Statement of Facts as set forth on pages 3 to 7 of their main brief; however, Appellants feel compelled to direct the Court's attention to certain facts in order to clarify certain misconceptions which may arise upon a reading of the Statement of Facts contained in the brief of Appellees:

A. On page 4 of their brief, Appellees state that their "motion for approval of the Compromise was denied because

the existence of the Compromise had not been judicially determined." Appellees' contention is based upon statements made by the Bankruptcy Judge during the hearing of January 5, 1977 to the effect that he would not decide whether what occurred in his chambers constituted a complete and entire settlement. (JA-132 and JA-137). Presumably, the Bankruptcy Judge did not find it necessary to reach the question of whether there was an entire settlement because he was able to dispose of the matter before him (i.e. whether or not to approve the Compromise) on other grounds. As noted at page 5 of Appellants' main brief, Judge Galgay denied Appellants' motion for approval of the Compromise on the ground that Appellants had withdrawn their offer of settlement, stating:

"in any event, if there were a settlement entered into, that settlement has been withdrawn, so I find nothing before me, and I am not going to order the relief requested." (JA-133)

"My problem is that there is no offer of settlement before me. It has been withdrawn if there was one." (JA-137)

Thus, Appellees' motion for approval of the Compromise was denied because of the judicial determination that there was no compromise, the offer to compromise having been withdrawn, not for the reason stated by Appellees at page 4 of their brief.

B. On page 3 of their brief, Appellees note that the prior appeals taken by Appellants were dismissed. Clari-

fication is necessary in view of the circumstances of said dismissal. The dismissal occurred upon stipulation of the parties (JA-364) which was entered into at the urging of District Judge Knapp in order that the matters which are the subject of the instant appeal and the related appeal (77-7339) could come before this Court in one neat package. It should be noted that at one point during the hearings before him, Judge Knapp was prepared to sign a certification to the Court of Appeals pursuant to 28 U.S.C. §1292 in order to clear up the problems caused by the existence of two related appeals at different levels of the judicial ladder. The dismissal of Appellants' first appeal and the subsequent referral of the appeal from the Bankruptcy Judge's order of April 5, 1977 approving the Compromise in question has brought about the result that the instant appeal and the related appeal (77-7339) have come before the Court of Appeals at the same time in order to facilitate judicial efficiency.

C. Finally, Appellees state that they have filed a plan of arrangement with the Bankruptcy Court and that pursuant thereto the net proceeds from the Compromise with Appellants are to be assigned to general creditors for pro rata distribution. It must be noted that said plan of arrangement has not yet been accepted by the creditor body at large nor approved by the Bankruptcy Court as required by the Bankruptcy Act. In addition, the Findings of Fact, Conclusions of Law

and Order of the Bankruptcy Court, dated April 5, 1977 (JA-360) whereby Judge Galgay approved the Compromise make no mention of assignment of the proceeds from the Compromise to general creditors. Conceivably, when Judge Galgay approved the settlement, he considered that it might provide an influx of operating capital to the debtor which it sorely needed.

POINT I

THE BANKRUPTCY COURT WAS DIVESTED OF
JURISDICTION TO APPROVE THE COMPROMISE
BY VIRTUE OF A NOTICE OF APPEAL FILED
BY APPELLANTS, HENCE THE DISTRICT
COURT ERRED IN AFFIRMING THE BANKRUPTCY
COURT'S APPROVAL OF THE COMPROMISE

Appellants, in their main brief, have demonstrated that the filing of a notice of appeal vests jurisdiction in the Appellate Court of the matter appealed from and divests the lower courts of all jurisdiction to take any action with respect to the matter appealed from. (Point I.A of Appellants' brief) Appellees do not address this issue in their brief. Rather, they cite extensively from the opinion of the court below to uphold its validity. The reasoning, thus is circular. It is a bootstrap that begs the question.

Appellants respectfully submit that the opinion below was erroneous for a number of reasons:

First, the finding that Appellants filed their prior notice of appeal only in the civil case (JA-357) is

clearly erroneous. Appellants, in their main brief, have demonstrated that notice of appeal was duly docketed in the bankruptcy case (JA-2) and that the notice of appeal clearly indicates Appellants' intention to appeal from the bankruptcy aspects of Judge Knapp's opinion. (JA-157).

Second, the opinion of the court below stated that the order appealed from was manifestly not final (JA-367). Appellants respectfully submit that an order dismissing an appeal is a final order and thereby appealable.

Third, the opinion below blithely states: "It would be a wasteful duplication of judicial effort to require Judge Galgay to conduct proceedings concerning the settlement all over again." To uphold the decision of the Bankruptcy Court made when it was divested of jurisdiction to act merely because it later was revested with jurisdiction in the interests of judicial economy deprives Appellants of a valuable right, i.e. to have the status quo preserved while an appeal is pending. Such a precedent is a dangerous one and could be construed as allowing lower courts to act while they are divested of jurisdiction to do so. In addition, to say that it is wasteful to require the Bankruptcy Court to conduct proceedings concerning the settlement again may be a tidy answer but does not recognize that there may have been changed circumstances since the Bankruptcy Court approved the compromise, especially in view of the circumstance that the Bankruptcy Court was divested of jurisdiction with respect to

the compromise at the time it acted.

Thus, the assumptions upon which the court below based its findings in its opinion of June 6, 1977 were clearly incorrect. Therefore the holding therein also is incorrect. Appellants submit that in view of the foregoing the Court should reverse the order of the District Court and find that the Bankruptcy Court was without jurisdiction to approve the Compromise by virtue of the prior notice of appeal filed on March 25, 1977 and subsequently withdrawn on May 3, 1977.

POINT II

IT IS NOT NECESSARY FOR APPELLANTS TO ARGUE THAT THE BANKRUPTCY COURT'S ORDER APPROVING THE COMPROMISE AND THE DISTRICT COURT'S AFFIRMANCE THEREOF WERE CLEARLY ERRONEOUS WHEN THERE ARE JURISDICTIONAL AND PROCEDURAL GROUNDS FOR REVERSAL OF THE FINDINGS BELOW

Appellees have responded interestingly to an issue not raised by Appellants (Point III of Appellees' brief), Appellants have not argued that the Findings of Fact, and Conclusions of Law themselves are clearly erroneous despite Appellees' assertion that Appellants have done so.

(Appellees' brief, page 3). Rather than argue said point, Appellants have raised certain procedural and jurisdictional questions concerning the entry of the Bankruptcy Court's Findings of Fact, Conclusions of Law and Order dated April 5, 1977 and also rest on the disposition of the related appeal (77-7339) with respect to the principal substantive issue on

appeal, i.e. whether there is a compromise. That issue has been fully briefed by both parties in the briefs submitted in connection with the related appeal (77-7339). It is not necessary to challenge the Bankruptcy Judge's discretion in approving the Compromise as being in the best interests of the creditors and estate. A more fundamental question before this Court is whether any agreement in fact existed. That and the related questions discussed in Appellants' main brief are the questions before this Court now.

POINT III

THIS APPEAL IS NOT FRIVOLOUS

The instant appeal and the related appeal are not frivolous. The threshold question of whether there is a compromise between Appellants and Appellees goes to the heart of both appeals. It is a substantial question which Appellants believe has been answered incorrectly heretofore by the District Court.

With respect to the existence of the Compromise, Appellants, at every juncture, have asserted that there is no compromise while Appellees have asserted that there is a compromise. The courts below have differed with respect to this question. The Bankruptcy Court found that there was no compromise, while the District Court found that there was such a compromise. Further, Appellants have consistently

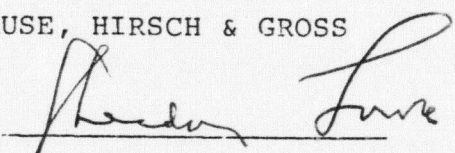
raised substantial jurisdictional and critical procedural questions. On the record, herein, to assert that this appeal as well as the related appeal is frivolous is an affront to this Court's intelligence. We remind the Court that, in addition to the legal questions presented, this appeal involves a purported settlement for about \$250,000 of an antitrust suit in which Appellants potential exposure is \$23,000,000 (and subject to treble damages).

CONCLUSION

For the foregoing reasons and for the reasons set forth in Appellants' main brief, the judgment entered by the District Court should be reversed, and the approval by the Bankruptcy Court of the purported compromise should be vacated.

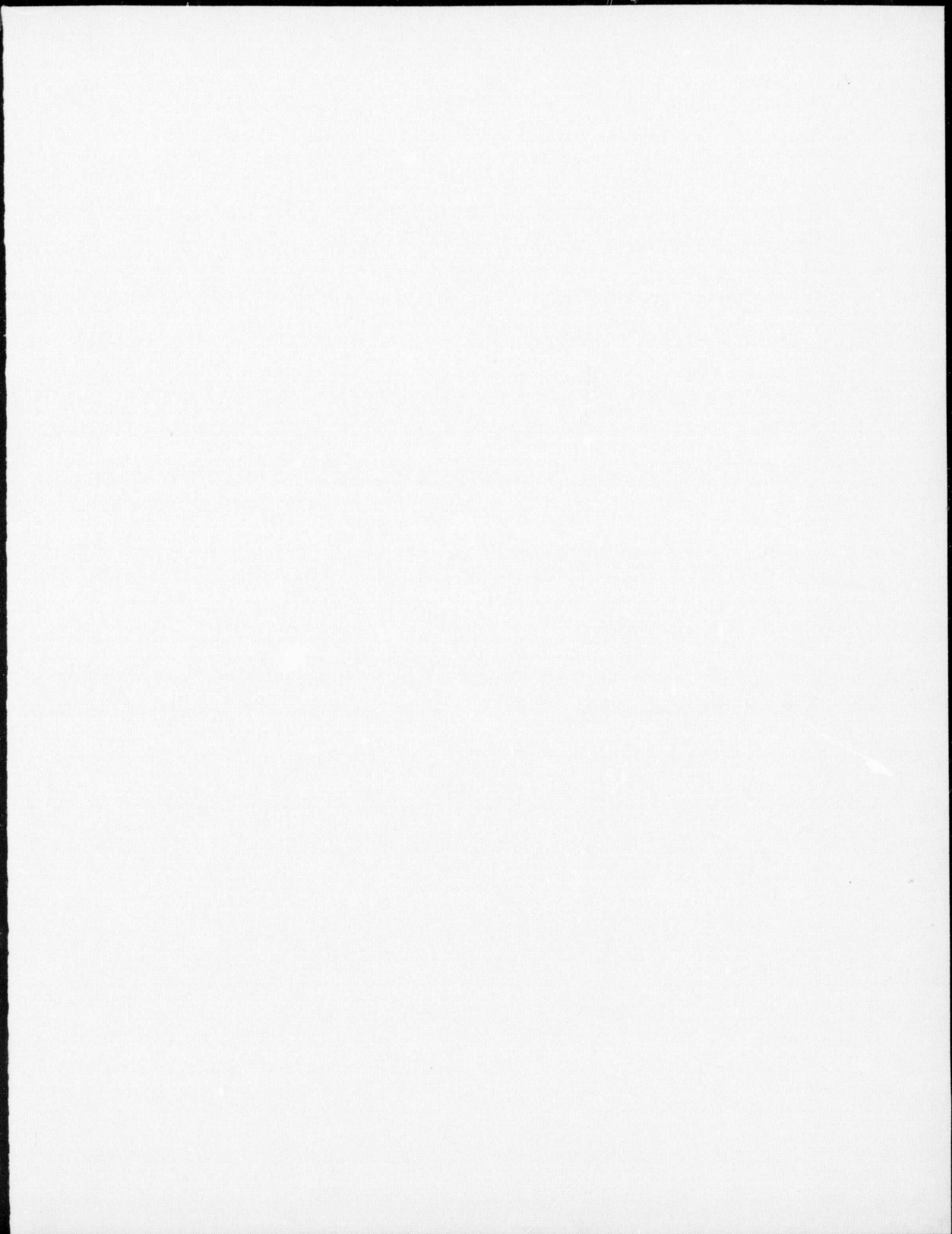
Respectfully submitted,

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Receipt acknowledged

9/19/77 1:55 P.M.

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